Supreme Court, U.S.
FILED

SEP 22 2003

OFFICE OF THE CLERK

No. 03-450

In The

Supreme Court of the United States

DAN RODRIGUEZ,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Thirteenth District Of Texas-Corpus Christi

PETITION FOR WRIT OF CERTIORARI

H. MANUEL HERNANDEZ
P.O. Box 916692
Longwood, FL 32791
Telephone: 407-682-5553
FAX: 407-682-5543
E-mail: hmh4law@cfl.rr.com
Counsel for Petitioner

18 pp

QUESTION PRESENTED

Whether the decision below to deny petitioner's motion to continue in order to allow petitioner's alibi witnesses time to finalize arrangements to obtain visas and travel to Texas from South America to testify at the petitioner's capital murder and aggravated kidnaping trial, and the appellate court's refusal to review the trial court's unreasoning and arbitrary insistence upon expeditiousness in face of a justifiable request for delay, was in conflict with relevant prior decisions of this Court, violated petitioner's Fourteenth Amendment right to due process and petitioner's Sixth Amendment right to effective assistance of counsel, and deprived petitioner of any meaningful appellate review of the federal law arguments raised during the direct appeal of his illegal conviction and life sentence.

LIST OF PARTIES

The parties to the original proceedings in the Court of Appeals for the Thirteenth District of Texas-Corpus Christi, the Court of Criminal Appeals of Texas, and the 138th District Court of Cameron County, Texas, were the petitioner Dan Rodríguez and the State of Texas.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF THE PARTIES	ii
TABLE OF AUTHORITIES	iv
Cases	iv
Constitutional Authorities	v
Statutes and Rules	v
Other Authority	v
PETITION FOR WRIT OF CERTIORARI	1
OPINION BELOW	1
GROUNDS FOR JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	6
A. History of Proceedings and Material Facts	6
B. The State Court of Appeals' Decisions	8
C. Basis of Federal Question and Jurisdiction of Supreme Court to Review State Court's Decision in Criminal Proceeding	9
REASONS FOR GRANTING THIS PETITION	10
CONCLUSION	16
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

CASES

Ashcraft v. State, 900 S.W.2d 817 (Tex.App.-Corpus Christi 1995, pet. ref'd) 15

Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) 12

Chandler v. Fretag, 348 U.S. 3, 75 S.Ct. 1, 99 L.Ed. 4 (1954) 12

Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) 12

Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) 13

Flores v. State, 789 S.W.2d 694 (Tex.App.-Houston [1st Dist.] 1990, no pet.) 15

Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956) 13

Morris v. Slappy, 461 U.S. 1, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983) 11, 12

Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974) 13

Unger v. Sarafite, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964) 11, 12

United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) 13

Varela v. State, 561 S.W.2d 186 (Tex.Crim.App. 1978) 15

White v. Ragen, 324 U.S. 760, 65 S.Ct. 978, 89 L.Ed.1345 (1945) 12

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL AUTHORITIES

U. S. Const., Amend. VI 2, 9, 11, 13

U. S. Const., Amend. XIV 2, 9, 11, 12

STATUTES AND RULES

28 U.S.C. § 1257(a) 1

S. Ct. R. 10(a) 2

S. Ct. R. 13.1 ..... 1, 3

Tex. Code Crim. P., Art. 37.0711.2 (1993) 7

Tex. Code Crim. P., Art. 29.03 ..... 3, 14

Tex. Code Crim. P., Art. 29.06 ..... 3, 7, 14

Tex. Code Crim. P., Art. 29.08 ..... 5, 14

Tex. R. App. P. 21.2 ..... 5, 14

Tex. R. App. P. 21.4 ..... 5, 14

Tex. R. App. P. 21.8 6

Tex. R. App. P. 21.8(c) 8

OTHER AUTHORITY

Black's Law Dictionary 66 (Deluxe 5th ed. 1979) 14

PETITION FOR WRIT OF CERTIORARI

Petitioner Dan Rodríguez respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Thirteenth District of Texas-Corpus Christi, issued on December 19, 2002, the review of which was refused by the Court of Criminal Appeals of Texas on June 25, 2003.

OPINION BELOW

On December 19, 2002 the Court of Appeals for the Thirteenth District of Texas-Corpus Christi, issued an unpublished and unreported opinion affirming the petitioner's conviction and sentence for capital murder and aggravated kidnaping in the 138th District Court of Cameron County, Texas. (App. 1-8). The Court of Criminal Appeals of Texas refused petitioner's request for discretionary review on June 25, 2003. (App. 15).

GROUNDS FOR JURISDICTION

This Court's jurisdiction is invoked by the timely filing of this Petition for a Writ of Certiorari within the prescribed ninety days from denial of review on June 25, 2003, by the state court of last resort, here the Court of Criminal Appeals of Texas. *See,* 28 U.S.C. § 1257(a); S. Ct. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

U. S. CONST., Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

U. S. CONST., Amend. XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

SUPREME COURT RULES

S. Ct. R. 10(a): Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

. . .

(c) a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court.

. . .

S. Ct. R. 13.1: Review on Certiorari: Time for Petitioning

1. . . . A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

. . .

TEXAS CODE OF CRIMINAL PROCEDURE

CHAPTER TWENTY-NINE – CONTINUANCE

Tex. Code Crim. P., Art. 29.03. For sufficient cause shown

A criminal action may be continued on the written motion of the State or of the defendant, upon sufficient cause shown; which cause shall be fully set forth in the motion. A continuance may be only for as long as is necessary.

Tex. Code Crim. P., Art. 29.06. First Motion by Defendant

In the first motion by the defendant for a continuance, it shall be necessary, if the same be on account of the absence of a witness, to state:

1. The name of the witness and his residence, if known, or that his residence is not known.

2. The diligence which has been used to procure his attendance; and it shall not be considered sufficient diligence to have caused to be issued, or to have applied for, a subpoena, in cases where the law authorized an attachment to issue.

3. The facts which are expected to be proved by the witness, and it must appear to the court that they are material.

4. That the witness is not absent by the procurement or consent of the defendant.

5. That the motion is not made for delay.

6. That there is no reasonable expectation that attendance of the witness can be secured during the present term of court by a postponement of the trial to some future day of said term. The truth of the first, or any subsequent motion, as well as the merit of the ground set forth therein and its sufficiency shall be addressed to the sound discretion of the court called to pass upon the same, and shall not be granted as a matter of right. If a motion for continuance be overruled, and the defendant convicted, if it appear upon the trial that the evidence of the witness or witnesses named in the motion was of a material character, and that the facts set forth in said motion were probably true, a new trial should be granted, and the cause continued or postponed to a future day of the same term.

Tex. Code Crim. P., Art. 29.08 Motion sworn to

All motions for continuance must be sworn to by a person having personal knowledge of the facts relied on for the continuance.

CHAPTER THIRTY-SEVEN – THE VERDICT

Tex. Code Crim. P., Art. 37.0711. Procedure in capital cases for offenses committed before September 1, 1991

. . .

Sec. 2. If a defendant is found guilty in a case in which the state does not seek the death penalty, the judge shall sentence the defendant to life imprisonment.

. . .

TEXAS RULES OF APPELLATE PROCEDURE

SECTION TWO. APPEALS FROM TRIAL COURT JUDGEMENTS AND ORDERS

Tex. R. App. P. 21.2 When Motion for New Trial Required

A motion for a new trial is a prerequisite to presenting a point of error on appeal only when necessary to adduce facts not in the record.

Tex. R. App. P. 21.4 Time to File and Amend Motion

. . .

(b) *To Amend.* Within 30 days after the date when the trial court imposes or suspends sentence in open court

but before the court overrules any preceding motion for new trial, a defendant may, without leave of the court, file one or more amended motions for new trial.

Tex. R. App. P. 21.8 Court's Ruling

(a) *Time to Rule.* The court must rule on a motion for a new trial within 75 days after imposing or suspending sentence in open court.

. . .

(c) *Failure to Rule.* A motion not timely ruled on by written order will be deemed denied when the period prescribed in (a) expires.

STATEMENT OF THE CASE

A. History of Proceedings and Material Facts

On August 6, 1989, the alleged victim, Jose Alberto Ramírez was abducted from in front of his house by three men who purportedly identified themselves as police officers. According to the testimony at trial, the alleged victim has never been seen or heard from again. Subsequent investigation connected the petitioner to the alleged crime and a warrant was issued.

Petitioner voluntarily returned to the United States from South America in July of 1999 to face the charges lodged against him in Texas. He was arrested as he checked through U.S. Customs in Miami, Florida and was subsequently extradited to Texas. On September 13, 2000, the petitioner was indicted and charged with two counts of capital murder and two counts of aggravated kidnaping.

(App. 16-20). Although the state did not seek the death penalty, under Texas law a conviction for capital murder where the state does not seek the death penalty requires that the judge sentence the defendant to life imprisonment. *Tex. Code Crim. P.*, Art. 37.0711.2 (1993). Petitioner was arraigned on October 20, 2000. The trial was tentatively set for November 27, 2000, but was reset by the trial court to January 16, 2001. On December 15, 2000, less than two months after petitioner's arraignment in Texas, petitioner's lead counsel of choice filed a motion to appear *pro hac vice,* and on December 19, 2000 filed a sworn motion for a first time continuance pursuant to *Tex. Code Crim. P.*, Art. 29.06. The trial court held a hearing on both motions on January 8, 2001. Although petitioner's lead counsel sought a four-month continuance based on his recent entry into the case and previous trial commitments in other cases, the trial court only agreed to a two-month continuance telling petitioner's lead counsel of choice only that *"we try cases quickly."* (App. 21-24).

The trial was set for March 5, 2001. Petitioner's lead counsel of choice was ultimately able to resolve his other trial commitments and stayed in the case. However, on the first day of trial, petitioner's lead counsel filed a second sworn motion seeking a continuance based on, *inter alia,* the fact that three critical defense alibi witnesses from Colombia, South America, who were prepared to testify that the petitioner was in Colombia on the day of the kidnaping, were unable to obtain visas in time to appear and testify at the trial. (App. 25-28). After a perfunctory hearing on the petitioner's motion, the trial court summarily denied petitioner's motion for a two-month continuance. (App. 29-34). The trial court also denied the petitioner's request, made at the close of the defense case

before the defense rested, to continue the case to allow him time to obtain the appearance of these witnesses. The trial court concluded that the petitioner supposedly knew about his pending charges for almost two years, and had enough time to arrange to have his alibi witnesses available for trial. (App. 35-38). The trial court did not address the fact that petitioner's trial had only been scheduled two months before the final March trial date, the petitioner had only been in custody for seven months, petitioner's lead trial counsel had only been retained three months earlier, the case itself involved events that took place more than 12 years ago, and the state could show no prejudice.

Barred from presenting the "heart of his defense" for no reason other than that *"we try cases quickly,"* the petitioner was predictably convicted as charged after a three-day jury trial, and sentenced to life in prison. (App. 9-14). Petitioner's motion for a new trial (App. 39-42), supported by affidavits from the petitioner's three alibi witnesses filed by separate motion two weeks later (App. 43-55), was also denied without a written order after petitioner's lead counsel was unable to attend a scheduled hearing due to illness, and a new hearing could not be held within the prescribed time period required by the rule. *See, Tex. R. App. P.* 21.8(c).

B. The State Court of Appeals' Decisions

On appeal, the Court of Appeals for the Thirteenth District of Texas-Corpus Christi concluded that the petitioner had waived any error regarding the denial of the motion to continue and otherwise affirmed his conviction and life sentence. The court found that the petitioner allegedly failed to preserve his claim that the denial of his

motion for a continuance deprived him of his right to a fair trial, due process and effective assistance of counsel, in violation of his constitutional rights, because, according to the appellate court, the petitioner's motion for a new trial was not sworn, did not provide sufficient detail as to what the three alibi witnesses would have testified to if called, and did not have sworn affidavits attached to his motion for a new trial. (App. 2-3). In so deciding, the court of appeals misapprehended the record and misapplied Texas law. The Court of Criminal Appeals of Texas refused petitioner's request for discretionary review. (App. 15).

C. Basis of Federal Question and Jurisdiction of Supreme Court to Review State Court's Decision in Criminal Proceeding

In the petitioner's written motion for a continuance, as well as in his subsequent oral motions for a continuance, and in his appellate brief, petitioner argued that denial of his motions for a continuance would, and did, deprive him of his constitutional right to a fair trial, due process, and effective assistance of counsel. U.S. Const., Amends. XIV and VI. (App. 19, 35); *see also,* Appellant's Brief, at pp. 10-11. The trial court and the appellate courts refused to grant the petitioner any relief or redress. The appellate court's misstatement of the record and misapplication of Texas law, resulting in the finding that the petitioner had waived this issue, deprived the petitioner of any meaningful review of the federal question and federal constitutional issues raised by petitioner in his appeal. This Petition for a Writ of Certiorari follows.

REASONS FOR GRANTING THIS PETITION

THE DECISION BELOW TO DENY PETITIONER'S MOTION TO CONTINUE IN ORDER TO ALLOW PETITIONER'S ALIBI WITNESSES TO FINALIZE ARRANGEMENTS TO OBTAIN VISAS AND TRAVEL TO TEXAS FROM SOUTH AMERICA TO TESTIFY AT THE PETITIONER'S CAPITAL MURDER AND AGGRAVATED KIDNAPING TRIAL, AND THE APPELLATE COURT'S REFUSAL TO REVIEW THE TRIAL COURT'S UNREASONING AND ARBITRARY INSISTENCE UPON EXPEDITIOUSNESS IN FACE OF A JUSTIFIABLE REQUEST FOR DELAY, WAS IN CONFLICT WITH RELEVANT PRIOR DECISIONS OF THIS COURT, VIOLATED PETITIONER'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND PETITIONER'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, AND DEPRIVED PETITIONER OF ANY MEANINGFUL APPELLATE REVIEW OF THE FEDERAL LAW ARGUMENTS RAISED DURING THE DIRECT APPEAL OF HIS ILLEGAL CONVICTION AND LIFE SENTENCE.

Rushing criminal defendants to trial, no matter how serious the charges, and how devastating the consequences of being convicted, even when the accused wants, and arguably needs, more time to prepare, is becoming a serious problem in some of our Nation's criminal courts. "Rocket dockets" in criminal cases merit the attention and guidance of this Court. This petition should be granted because there was simply no plausible reason for the trial court to rush the petitioner and his recently retained defense counsel of choice to trial, and the appellate court's refusal to address this critical issue based on alleged procedural failings, were both factually and legally incorrect.

First, the petitioner was facing extremely serious charges, capital murder and aggravated kidnaping, and a mandatory life sentence if convicted. Second, the facts underlying the charges occurred more than ten years earlier. Third, the "heart of the defense" was that the petitioner had left Texas the day before the alleged kidnaping and murder, and the state's eye witnesses, all of whom admitted that they had only seen the person they claimed was the petitioner for a matter of seconds (Trial Trans. 1st Day-3/6/01, Rept. Rec. Vol. 5, at pp. 45, 46, 55, 66, 67, 100, 103), had confused petitioner with his cousin, who looked like petitioner and was in Texas with the other alleged kidnapers after the petitioner left Texas for South America. Finally, there was no claim that a continuance would have prejudiced the state in any way.

The defense's alibi witnesses were essential. The record is clear that defense counsel made every effort to get these critical witnesses to the trial, and would have had them available to testify if the court had granted a short two-month continuance. (App. 23, 29-30, 35-45). Forging ahead simply because, as the trial judge intimated during the first hearing for a continuance, *"we try cases quickly"* (App. 47), deprived the petitioner of his right to due process, a fair trial, and effective assistance of counsel. U.S. Const., Amends. XIV and VI. It also ignored prior decisions of this Court.

This Court has held that a motion for a continuance is addressed to the sound discretion of the trial court, and is reviewed only for an abuse of that discretion. *Morris v. Slappy,* 461 U.S. 1, 11, 103 S.Ct. 1610, 1616, 75 L.Ed.2d 610 (1983). A denial of a motion to continue is examined on a case-by-case basis, focusing on the reasons for continuance presented at the time the motion is denied. *Unger v. Sarafite,* 376 U.S. 575, 589, 84 S.Ct. 841, 849-50, 11

L.Ed.2d 921 (1964). In order to obtain relief from a denial of a motion to continue, there must be a showing of both abuse of discretion and prejudice. *Id.*

However, while trial courts have broad discretion in deciding whether to grant or deny a motion for continuance, this Court has consistently held that an "unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay" is an abuse of discretion and violates a defendant's rights to due process and the assistance of counsel. *See, Morris v. Slappy, supra,* 461 U.S., at 11-12, 103 S.Ct., at 616; *Ungar v. Sarafite, supra,* 376 U.S., at 589, 84 S.Ct., at 849; *Chandler v. Fretag,* 348 U.S. 3, 9-10, 75 S.Ct. 1, 4-5, 99 L.Ed. 4 (1954); *White v. Ragen,* 324 U.S. 760, 764, 65 S.Ct. 978, 980, 89 L.Ed.1345 (1945). Such was the case here.

The constitutional right to due process in criminal trials guarantees that those accused in criminal cases have a fundamental constitutional right to a fair trial. U.S. Const., Amend. XIV. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi,* 410 U.S. 284, 294, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973). Moreover, "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky,* 476 U.S. 683, 690, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986). As this Court has stated in the context of examining the right to effective assistance of counsel and the right to a fair trial:

> The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true

> adversarial criminal trial has been conducted . . . the kind of testing envisioned by the Sixth Amendment has occurred.

United States v. Cronic, 466 U.S. 648, 656, 104 S.Ct. 2039, 2045, 80 L.Ed.2d 657 (1984).

Here petitioner was deprived of a meaningful opportunity to present not only a complete defense, but the very "heart of his defense," and the adversarial testing envisioned by the Sixth Amendment was denied in the name of the lower court's obsequious, unyielding, and unreasonable adherence to *"trying cases quickly,"* no matter how serious the charges and no matter how reasonable the request for a continuance is.

Also, the appellate court misconstrued the record and misapplied Texas law when the court refused to address the merits of petitioner's claim on this issue, finding that petitioner waived the right to raise this issue because petitioner's motion for a new trial was not sworn and did not have supporting affidavits attached to it. (App. 2-3). In the process, the appellate court deprived the petitioner of any meaningful review of the federal law issues raised in his appeal. And while the Constitution does not establish a right to an appeal, when a state establishes an appellate system, as Texas obviously has, it must be a fair system and provide for meaningful appellate review. *See i.e., Ross v. Moffitt,* 417 U.S. 600, 606, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974); *Douglas v. California,* 372 U.S. 353, 355-56, 83 S.Ct. 814, 815-16, 9 L.Ed.2d 811 (1963); *Griffin v. Illinois,* 351 U.S. 12, 19, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956).

It is clear from the record, and under the relevant Texas rules of criminal and appellate procedure, that the petitioner's claim regarding the trial court's denial of his

motion was not waived. First, "[a] motion for a new trial is a prerequisite to presenting a point of error on appeal ***only*** when necessary to adduce facts not in the record." *Tex. R. App. P.* 21.2. (Emphasis added). In this case, petitioner filed a sworn motion for a continuance in compliance with *Tex. Code Crim. P.*, Arts. 29.03, 29.06 and 29.08, setting out in detail the reason a continuance was needed. (App. 25-28). In addition, petitioner's trial counsel explained the need for a continuance on the record twice. (App. 29-34, 35-38). Finally, it is respectfully submitted that there was little need to elaborate on the potential testimony of the three alibi witnesses. Black's Law Dictionary defines the term "alibi" as "[a] defense that places the defendant at the relevant time in a different place than the scene involved and so removed therefrom as to render it impossible for him to be the guilty party." Black's Law Dictionary 66 (Deluxe 5th ed. 1979). The very description of the witnesses as "alibi" type witnesses explained the content and importance of their testimony. Nothing more was needed to "adduce facts not in the record."

Second, petitioner did file a motion for new trial. And while it was unsworn, nothing in the rules regarding motions for new trials requires that such a motion be sworn. *See, Tex. R. App. P.* 21.2, *et seq.* More importantly, it was supported by affidavits from the alibi witnesses that petitioner filed on April 4, 2001. (App. 43-55). While the affidavits were filed after petitioner's motion for a new trial was filed, they were filed before the court ruled on petitioner's motion, and within 30 days of the imposition of his sentence on March 8, 2001. (App. 10). Under the relevant rules, the notice of filing with the supporting affidavits was timely. *See, Tex. R. App. P.* 21.4 (Allowing

for filing of amended motions for new trial without leave of the court within 30 days of sentence).

The appellate court relied on the holding in *Ashcraft v. State,* 900 S.W.2d 817 (Tex.App.-Corpus Christi 1995, pet. ref'd) for its conclusion that the motion for new trial was required, that it had to be sworn, and that the motion had to be supported by affidavits. (App. 3). In fact, that is the holding in *Ashcraft. Id.,* at 834. The court in *Ashcraft* based its ruling on two other cases, *Varela v. State,* 561 S.W.2d 186 (Tex.Crim.App. 1978) and *Flores v. State,* 789 S.W.2d 694 (Tex.App.-Houston [1st Dist.] 1990, no pet.). The court in *Flores,* like the court in *Ashcraft,* relied on the *Varela* decision, a case decided by the Criminal Court of Appeals of Texas, the highest court in Texas reviewing criminal cases. *Flores* held that a sworn motion for a new trial was required when a motion to continue based on the unavailability of witnesses is denied, and the motion must set out what the witnesses would have testified if they had been called, although in *Flores,* no affidavits are required in addition to the sworn motion. *Flores, supra,* at 698-99. However, *Varela* did not hold that a motion for new trial had to be sworn ***and*** supported by affidavits. Rather, *Varela* held that a motion for new trial was required when appealing a denial of a motion for continuance, and ***either*** the motion had to be sworn, ***or*** it had to be supported by affidavits from the missing witnesses. *Varela, supra,* at 191. *Flores* and *Ashcraft* have misconstrued the holding in *Varela,* and the holdings in these cases, which are incorrect statements of the law in Texas, have wormed themselves into the case law of other appellate decisions, including the appellate court's decision here. Petitioner's motion for a new trial was sufficient, and the court of appeals should have addressed the issue regarding the

denial of petitioner's motion for a continuance on the merits.

CONCLUSION

The petitioner was denied a fair trial and deprived of the opportunity to present the "heart of his defense." Based on the foregoing arguments and citations of authority, petitioner Dan Rodríguez requests that this Court grant his Petition for a Writ of Certiorari, set aside his conviction and sentence, and remand his case for a new trial.

Respectfully submitted this 22nd day of September 2003.

H. MANUEL HERNANDEZ
P.O. Box 916692
Longwood, FL 32791
Telephone: 407-682-5553
FAX: 407-682-5543
E-mail: hmh4law@cfl.rr.com
Counsel for Petitioner

INDEX TO APPENDIX

Page

Opinion – Court of Appeals Thirteenth District of Texas-Corpus Christi ..... App. 1

Judgment of Jury Verdict of Guilty and Sentence ..... App. 9

Order – Petition for Discretionary Review Refused – Court of Criminal Appeals of Texas ..... App. 15

Indictment ..... App. 16

Motion Hearing Transcript Excerpt – January 8, 2001 ..... App. 21

Verified Motion for Continuance – March 5, 2001 ... App. 25

Trial Transcript Excerpt – March 5, 2001 ..... App. 29

Trial Transcript Excerpt – March 8, 2001 ..... App. 35

Motion for New Trial – March 19, 2001 ..... App. 39

Notice of Filing Affidavits – April 4, 2001 ..... App. 43

(SEAL)

NUMBER 13-01-203-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI

DAN RODRIGUEZ, Appellant,

v.

THE STATE OF TEXAS, Appellee.

On appeal from the 138th District Court
of Cameron County, Texas.

OPINION

Before Chief Justice Valdez and Justices Dorsey and Rodriguez

Opinion by Justice Rodriguez

Appellant, Dan Rodriguez, brings this appeal following his conviction for capital murder and aggravated kidnapping. By seven issues, appellant contends the State committed improper jury argument, and, the trial court erred by: (1) denying appellant's motion for continuance; (2) denying appellant's request for additional time during his voir dire; (3) giving an improper jury charge; (4) allowing testimony of a fingerprint analysis; and (5) denying appellant's challenges to two jury members. Appellant also contends that the cumulative effect of all alleged errors denied his right to a fair trial. We affirm.

I. Facts

On August 6, 1989, Jose Alberto Ramirez was abducted in front of his home by three men posing as police officers. Ramirez was never seen or heard from again. Following an investigation, a warrant was issued for appellant. The State contended that appellant was one of the three men involved in the abduction and killing of Ramirez. Appellant was eventually arrested in 1999 at the Miami International Airport after arriving from Columbia.

Following a trial to the jury, appellant was convicted of two counts of capital murder and two counts of aggravated kidnapping. The trial court sentenced appellant to life imprisonment on each count, the sentences to run concurrently, in the Texas Department of Criminal Justice – Institutional Division. This appeal ensued.

II. Motion for Continuance

By his first issue, appellant contends the trial court erred by denying one of his motions for continuance because he was having trouble making travel arrangements for three alibi witnesses from Columbia. We find it unnecessary to reach appellant's contention because error, if any, was waived.

To preserve error and challenge a trial court's refusal of a motion for continuance made because of an absent witness, an appellant must file a sworn motion for new trial stating the testimony he expected to present by the witness, *Ashcraft v. State*, 900 S.W.2d 817, 834 (Tex. App. – Corpus Christi 1995, pet. ref'd), and must show how the witness's testimony would have been material. *Gentry v. State*, 770 S.W.2d 780, 787 (Tex. Crim. App. 1988). A mere recitation that the appellant expects to prove certain

things by the witness is not sufficient. *Id.* at 788 (citing *Parsons v. State*, 160 Tex. Crim. 387, 271 S.W.2d 643 (1954)). Additionally, a showing under oath by means of an affidavit of the missing witness or other source as to what the witness would testify must accompany the motion for new trial. *Ashcraft*, 900 S.W.2d at 834.

In this instance, appellant not only failed to file a sworn motion for new trial providing detail as to what the witnesses would testify to, but he also failed to file a sworn affidavit with his motion for new trial giving detail as to what the witness would testify to. *Ashcraft*, 900 S.W.2d at 834. Thus, appellant failed to preserve error. *Id.* Appellant's first issue is overruled.

III. VOIR DIRE

By his second issue, appellant contends the trial court erred by limiting his voir dire to forty-five minutes.

The control of voir dire is within the sound discretion of the trial court, and the court may impose reasonable restrictions on the manner in which the voir dire is conducted. *See McCarter v. State*, 837 S.W.2d 117, 120 (Tex. Crim. App. 1992); *Ratliff v. State*, 690 S.W.2d 597, 599 (Tex. Crim. App. 1985). The discretionary authority extends to imposing reasonable limits on the time allotted for counsel to question the jury. *See Caldwell v. State*, 818 S.W.2d 790, 793 (Tex. Crim. App. 1991), *overruled on other grounds, Castillo v. State*, 913 S.W.2d 529, 533 (Tex. Crim. App. 1995); *Menchaca v. State*, 901 S.W.2d 640, 645 (Tex. App. – El Paso 1995, pet. ref'd). In determining whether the trial court abused its discretion by imposing a time limitation, we must consider whether: (1) the complaining party attempted to prolong voir dire; (2) the questions that

the party was not permitted to ask were proper voir dire questions; and (3) if the party was precluded from examining prospective jurors who actually served on the jury. *See McCarter*, 837 S.W.2d at 119; *Ratliff*, 690 S.W.2d at 599. Every case must be examined on its own facts. *Ratliff*, 690 S.W.2d at 600.

In this instance, appellant filed a motion requesting a minimum of three hours to conduct voir dire. During the pre-trial hearing, the trial court informed appellant that he usually allowed a maximum of twenty-five minutes, but that because of the circumstances he would allow appellant forty-five minutes for voir dire. During voir dire, appellant's counsel asked questions and discussed a variety of topics with the jurors, including: prior service; attitude toward service; contact with law enforcement; wrongful accusation; belief that an arrest is not evidence of guilt; presumption of innocence; burden of proof; and the nature of the case. When the trial court informed appellant that his forty-five minutes expired, appellant requested an additional hour of time. His request was denied. Appellant then filed an eight page list of questions he claimed he was unable to ask because of the time limitation. Upon review of the list, we find the questions concerned topics discussed during appellant's forty-five minute voir dire.[1] Although appellant may have wanted to ask additional questions, the fact that a skilled lawyer can think of additional questions should not transform a reasonable time limit into an unreasonable limitation. *See*

[1] We note that the topic of pre-trial publicity was included in his list of questions, however, the trial court addressed this topic during voir dire.

Whitaker v. State, 653 S.W.2d 781, 782 (Tex. Crim. App. 1983). Thus, because most of the additional questions he wanted to ask were indeed asked during his original time period, we find that appellant was merely trying to prolong the voir dire process. *See McCarter*, 837 S.W.2d at 119; *Ratliff*, 690 S.W.2d at 599. We conclude the trial court, in this instance, did not abuse its discretion in limiting the voir dire to forty-five minutes. *See Thacker v. State*, 889 S.W.2d 380, 390-91 (Tex. App. – Houston [14th Dist.] 1994, no pet.) (if party unnecessarily prolongs voir dire, trial court's time limit is not an abuse of discretion). Appellant's second issue is overruled.

IV. Improper Arguments

By his third issue, appellant generally contends the State made improper jury arguments.

The State claims this issue is multifarious and, therefore, not subject to review. A multifarious issue is one that embraces more than one specific ground. *Stults v. State*, 23 S.W.3d 198, 205 (Tex. App. – Houston [14th Dist.] 2000, pet. ref'd). While we may disregard and refuse to review a multifarious issue, we may also elect to consider it if we are able to determine, with reasonable certainty, the alleged error about which the complaint is made. *Id.*

In this instance, appellant's brief is not sufficiently developed. Appellant makes bare assertions of improper conduct by the State, followed by string cites to support the assertions. However, not all of the assertions are supported by relevant cites. Appellant then lists examples from the record where alleged errors occurred without any corresponding argument or cases that relate to the record

cites. *See* TEX. R. APP. P. 38.1(h) (brief must contain clear and concise arguments for contentions made, with appropriate citations to authorities and to record). We will not make appellant's arguments for him and, thus, we hold this issue to be inadequately briefed. *See Tong v. State*, 25 S.W.3d 707, 710 (Tex. Crim. App. 2000); *Wyatt v. State*, 23 S.W.3d 18, 23 n.5 (Tex. Crim. App. 2000). Appellant's third issue is overruled.

V. JURY CHARGE

By his fourth issue, appellant contends the trial court erred by failing to include requested instructions to the jury concerning impeachment by inconsistent statements and prior criminal convictions of State's witness, Marvin Lee.

When a defendant impeaches a State's witness, an instruction limiting the jury's consideration of the impeaching testimony is unnecessary. *See Nethery v. State*, 692 S.W.2d 686, 705 (Tex. Crim. App. 1985); *Jones*, 810 S.W.2d 824, 828 (Tex. App. – Houston [14th Dist.] 1991, no pet.). Thus, because Lee was a State's witness, and he was impeached, an instruction was not necessary. Appellant's fourth issue is overruled.

VI. WITNESS LIST

By his fifth issue, appellant contends the trial court erred in allowing the State to introduce testimony of a witness not previously listed on the State's witness list. Specifically, appellant argues that the State's failure to disclose its fingerprint expert entitles him to a new trial.

Upon request by the defense, notice of the State's witnesses should be given. *Stoker v. State*, 788 S.W.2d 1, 15 (Tex. Crim. App. 1989) (citing *Young v. State*, 547 S.W.2d 23, 27 (Tex. Crim. App. 1977)). If a witness whose name is not on a witness list furnished the defendant is permitted to testify, the standard of review is whether the trial court abused its discretion in allowing such witness to testify. *Irvine v. State*, 857 S.W.2d 920, 926 (Tex. App. – Houston [1st Dist.] 1993, pet. ref'd) (citing *Stoker*, 788 S.W.2d at 15). In determining whether the trial court abused its discretion, this Court should consider whether: (1) the prosecutor acted in bad faith in failing to provide the defense with the name of the witness; and (2) the defendant could reasonably anticipate the witness would testify despite the State's failure to disclose the witness's name. *See id.* at 927.

In appellant's opening statement, he made clear that he would rely on an alibi/misidentification defense. As part of this strategy, appellant denied that an identification card (ID) belonged to him, and claimed he was not the person pictured on the ID. Given this trial strategy, appellant should have anticipated that a fingerprint examiner would testify as a rebuttal witness regarding appellant's fingerprint found on the ID. *See id.* Moreover, there is no evidence in the record of bad faith on part of the State. *See id.* We find the trial court did not abuse its discretion in allowing the testimony of the State's fingerprint examiner. Appellant's fifth issue is overruled.

VII. Challenges for Cause

By his sixth issue, appellant contends the trial court erred by denying his challenges to two jurors for cause.

However, appellant provides no authority in support of his argument that the two jurors should have been excluded. In accordance with rule 38.1(h) of the Texas Rules of Appellate Procedure, we will only consider contentions that are supported by clear and concise arguments with appropriate citations to authorities. Tex. R. App. P.38.1(h). We find this issue to be inadequately briefed. *See Tong*, 25 S.W.3d at 710. Appellant's sixth issue is overruled.

VIII. Cumulative Effect of Errors

By his seventh issue, appellant contends that the "cumulative effect of all errors committed during trial" entitle him to a new trial. However, because we have found no errors, this claim has no merit. *Cf. Feldman v. State*, 71 S.W.3d 738, 757 (Tex. Crim. App. 2002) ("A number of errors may be found harmful in their cumulative effect."). Appellant's sixth issue is overruled.

IX. Conclusion

Accordingly, we affirm the judgment of the trial court.

NELDA V. RODRIGUEZ
Justice

Do not publish.
Tex. R. App. P. 47.3.

Opinion delivered and filed this
19th day of December, 2002.

CAUSE NO. 00-CR-1025-B

THE STATE OF TEXAS	§	IN THE DISTRICT
VS	§	COURT OF
	§	
DAN RODRIGUEZ	§	CAMERON COUNTY,
	§	TEXAS
	§	
	§	138TH JUDICIAL
	§	DISTRICT

JUDGMENT OF JURY VERDICT OF GUILTY; PUNISHMENT FIXED BY COURT – NO PROBATION GRANTED; SENTENCE TO INSTITUTIONAL DIVISION

(Filed Mar. 15, 2001)

Judge Presiding: Robert Garza
Date of Judgment: 3/15/01

State's Attorney: Geoff Henley and James Sturgis
Defendant's Attorney: Richard R. Rodriguez
Ricardo R. Pesquera

Offense Convicted of: Capital Murder – Two Counts and
Aggravated Kidnapping – Two Counts

Degree of Offense: Captial [sic] Felony – Cts. I & II
First Degree Felony – Cts. III & IV
Date Offense Committed: 8/6/89

Charging Instrument: Indictment

Plea: Not Guilty

Jury Verdict: Guilty of all Four Counts

Plea to Enhancement Paragraphs: n/a
Enhancement Paragraph(s): n/a

Punishment assessed by: Court

Date sentence imposed: 3/8/01 Costs: $91.50

Punishment and
Place of Confinement: Count I – Life in TDCJ-ID
Count II – Life in TDCJ-ID
Count III – Life in TDCJ-ID
Count IV – Life in TDCJ-ID

Date to commence: 3/8/01

Time Credited: (238) Days
Total Amount of Restitution/Reparation: n/a

Concurrent unless otherwise specified. (all sentences in the 4 Counts to run concurrent)

BE IT REMEMBERED that on the **5th day of March, 2001**, this cause was called to trial and the State appeared by the attorney stated above, and the Defendants and the Defendant's attorneys were also present, and the Defendant, having been duly arraigned, pleaded Not Guilty and both parties announced ready for trial; thereupon a jury of twelve good and lawful persons, to wit: **Bethina Delgado**, and eleven others, was duly selected empanelled and sworn according to the law and charged

by the Court on separation; whereupon said cause was recessed until **March 6, 2001**.

THEREAFTER, on **March 6, 2001**, the indictment was read to the jury and the Defendant entered his plea of Not Guilty thereto whereupon the State introduced evidence and said cause was recessed until **March 7, 2001**.

THEREAFTER, on **March 7, 2001**, the State continued with their evidence and rested. Defendant made opening statement and presented evidence. Defendant's motion for instructed verdict was denied. The case was recessed until **March 8, 2001**.

THEREAFTER, on **March 8, 2001**, defendant continued with their evidence and rested. All parties closed, whereupon the charge was prepared and submitted to all counsel.

THEREAFTER, the Court charged the jury as to the law applicable to said cause and argument of counsel for the State and the Defendant was duly heard and concluded, and the jury retired in charge of the proper officer to consider their verdict, and afterward was brought into open court by the proper officer, the defendant and his counsel being present, and in due form of law returned into open court the following verdict, which was received by the Court and is here now entered upon the Minutes of the Court, to wit:

"We, the Jury, find the defendant, Dan Rodriguez "*Guilty*" of Capital Murder during the course of committing Kidnapping as charged in Count I of the indictment.

/s/ Bethina Delgado
Presiding Juror

We, the Jury, find the defendant, Dan Rodriguez "*Guilty*" of Capital Murder during the course of committing Retaliation as charged in Count II of the indictment.

/s/ Bethina Delgado
Presiding Juror

We, the Jury, find the defendant, Dan Rodriguez "*Guilty*" of Aggravated Kidnapping as charged in Count III of the indictment.

/s/ Bethina Delgado
Presiding Juror

We, the Jury, find the defendant, Dan Rodriguez "*Guilty*" of Aggravated Kidnapping as charged in Count IV of the indictment.

/s/ Bethina Delgado
Presiding Juror"

IT IS, THEREFORE, ORDERED ADJUDGED AND DECREED by the Court that the Defendant is guilty of the offenses of **Capital Murder in Count I, Capital Murder in Count II, Aggravated Kidnapping in Count III, and Aggravated Kidnapping in Count IV**, as found by the jury, and that said offenses was [sic] committed on **August 6, 1989**.

THEREAFTER, all parties announced ready for further hearing, the cause proceeded on the punishment phase, and the Court adjudged the Defendant guilty of the offenses of **Capital Murder in Count I, and Capital Murder in Count II**, as found by the jury.

THEREAFTER, the Defendant, having previously elected to have his punishment assessed by the jury, at

this time, through his attorney, requested the Court to have his punishment assessed by the Court, in Aggravated Kidnapping in Count I and in Aggravated Kidnapping in Count II, said jury was discharged.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the Defendant is guilty of the offenses of **Capital Murder in Count I, Capital Murder in Count II, Aggravated Kidnapping in Count III, and Aggravated Kidnapping in Count IV**, as found by the jury, and, the Court having waived the pre-sentence investigation report, the punishment is assessed by the Court at **LIFE in each of the above Counts, to run concurrently with each other**, at the Texas Department of Criminal Justice, Institutional Division, and the State of Texas do have and recover of said Defendant all court costs in this prosecution expended for which execution will issue.

And thereupon the Court asked the Defendant whether the Defendant had anything to say why said sentence should not be pronounced upon said Defendant, and the Defendant answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of said Defendant and the Defendant's attorney, to pronounce sentence upon said Defendant as follows:

IT IS ORDERED by the Court that the Defendant, who has been adjudged guilty of the offense of **Capital Murder in Count I, Capital Murder in Count II, Aggravated Kidnapping in Count III, and Aggravated Kidnapping in Count IV**, as found by the jury, be and is hereby sentenced to **LIFE in each of the above Counts, to run concurrently with each other**, in the Texas Department of Criminal Justice, Institutional

Division. The Defendant shall be taken by the authorized agent of the State of Texas or by the Sheriff of Cameron County, Texas, and by him safely conveyed and delivered to the Director of the institutional division of the Texas Department of Criminal Justice, there to be imprisoned in the manner and for the period aforesaid. The Defendant is hereby remanded to the custody of the Sheriff, until such time as the Sheriff can obey the directions of this sentence.

IT IS FURTHER ORDERED by the Court that Defendant's left or right thumb be fingerprinted, and that said thumbprint be marked as Exhibit "A" and is made a part hereof for all purposes.

Said Defendant is given credit on this sentence for (238) days on account of the time spent in jail.

SIGNED FOR ENTRY: March 15, 2001.

/s/ Robert Garza
ROBERT GARZA
Judge Presiding

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

[Postmarked June 26, 2003]

6/25/2003
COA#: 13-01-00203-CR
RE: Case No. PD-0464-03
STYLE: RODRIGUEZ, DAN

On this day, the Appellant's petition for discretionary review has been refused.

Troy C. Bennett, Jr.

Ignacio Torteya, III
Torteya & Torteya, P.L.L.C.
700 E. Washington St.
Brownsville, TX 78520 JUN 30 2003

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS

THE GRAND JURORS, for the County of Cameron and State aforesaid, duly organized as such at the **JULY** Term, **2000** of the **107TH** Judicial District in and for said County, upon their oaths in said Court, present that **DAN RODRIGUEZ, JULIO GONZALEZ AND FELIX SANCHEZ MOYET**, hereinafter called the Defendants, on or about the **6TH** day of **AUGUST, 1989**, and anterior to the presentment of this indictment, in the County of Cameron and State of Texas, did then and there intentionally cause the death of an individual, namely, **JOSE ALBERTO RAMIREZ**, by **shooting the said JOSE ALBERTO RAMIREZ or causing the death of JOSE ALBERTO RAMIREZ** in a **manner unknown to the Grand Jury**, and the defendants were then and there in the course of committing or attempting to commit the offense of **KIDNAPPING** of **JOSE ALBERTO RAMIREZ**.

COUNT II

AND THE GRAND JURORS AFORESAID, upon their Oaths in said Court do further present that **DAN RODRIGUEZ, JULIO GONZALEZ AND FELIX SANCHEZ MOYET**, hereinafter called the Defendants, on or about the **6TH** day of **AUGUST, 1989**, and anterior to the presentment of this indictment, in the County of Cameron and State of Texas, did then and there intentionally cause the death of an individual, namely, **JOSE ALBERTO RAMIREZ**, by **shooting the said JOSE ALBERTO RAMIREZ or by causing the death of JOSE ALBERTO RAMINEZ in a manner unknown to the Grand Jury,** and the defendants were then and there in

the course of committing or attempting to commit the offense of **RETALIATION** against **JOSE ALBERTO RAMIREZ**.

COUNT III

AND THE GRAND JURORS AFORESAID, upon their Oaths in said Court, do further present that **DAN RODRIGUEZ, JULIO GONZALEZ AND FELIX SANCHEZ MOYET**, hereinafter called the Defendants, on or about the **6TH** day of **AUGUST, 1989**, and anterior to the presentment of this indictment, in the County of Cameron and State of Texas, did then and there, with the intent to **terrorize JOSE ALBERTO RAMIREZ** intentionally or knowingly abduct **JOSE ALBERTO RAMIREZ** by restricting the movements of said **JOSE ALBERTO RAMIREZ** without **his** consent so as to interfere substantially with **his** liberty, by **confining him**, with the intent to prevent **his** liberation, by secreting or holding **him** in a place where **he** was not likely to be found, and the defendant did then and there use or exhibit a deadly weapon, to-wit: **a firearm**, during the commission of said offense,

And it is further presented in and to said court that during a period from **7th day of August, 1989** until **26th day of July, 1999**, the defendant was absent from the State of Texas.

COUNT IV

AND THE GRAND JURORS AFORESAID, upon their Oaths in said Court, do further present that **DAN RODRIGUEZ, JULIO GONZALEZ AND FELIX SANCHEZ MOYET**, hereinafter called the Defendants, on or about the **6TH** day of **AUGUST, 1989**, and anterior to the

presentment of this indictment, in the County of Cameron and State of Texas, did then and there, with the intent to **terrorize JOSE ALBERTO RAMIREZ** intentionally or knowingly abduct **JOSE ALBERTO RAMIREZ** by restricting the movements of said **JOSE ALBERTO RAMIREZ** without **his** consent so as to interfere substantially with **his** liberty by **moving him from one place to another**, with the intent to prevent **his** liberation, by secreting or holding **him** in a place where **he** was not likely to be found, and the defendant did then and there use or exhibit a deadly weapon, to-wit: **a firearm**, during the commission of said offense.

And it is further presented in and to said court that during a period from **7th day of August, 1989** until **26th day of July, 1999**, the defendant was absent from the State of Texas.

against the peace and dignity of the State.

/s/
Foreman of the Grand Jury

THE STATE OF TEXAS)
)
COUNTY OF CAMERON)

I, AURORA DE LA GARZA, Clerk of the District Courts of Cameron County, Texas, do hereby certify that the within and fore-

going is a true and correct copy of the Original Bill of Indictment, filed in said Court on _____ A.D. 20 ___ in Cause No. _____ styled the State of Texas vs.

_____

_____

Given under my hand and seal of said court, at office in Brownsville, Texas, this _____ day

of _____ A. D. 20 ___

AURORA DE LA GARZA, Clerk
By _____ Deputy

00-CR-1025-B

THE STATE OF TEXAS

vs.

DAN RODRIGUEZ, JULIO GONZALEZ AND FELIX SANCHEZ MOYET

INDICTMENT

OFFENSE:

CAPITAL MURDER (TWO COUNTS) AND AGGRAVATED KIDNAPPING (TWO COUNTS)

YOLANDA DE LEON

Criminal County Attorney

TRUE BILL:

/s/

Foreman of Grand Jury

Filed on SEP 13 2000

_____, 20 ___

AURORA DE LA GARZA, CLERK OF DISTRICT COURTS OF CAMERON COUNTY, TEXAS

By /s/ Gloria Medrano Deputy

Amount of Bail $ 2 million c/s on ea. def.

NAMES OF WITNESSES

#111904, #111905 and #111906

_____

_____

_____

REPORTER'S RECORD
VOLUME 2 OF 8 VOLUMES
TRIAL COURT CAUSE NO. 00-CR-1025-B

THE STATE OF TEXAS	IN THE DISTRICT COURT
VS.	138TH JUDICIAL DISTRICT
DAN RODRIGUEZ	CAMERON COUNTY, TEXAS

****

PRETRIAL HEARING

****

On the 8th day of January 2001, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Robert Garza, Judge presiding, held in Brownsville, Cameron County, Texas.

Proceedings reported by machine shorthand.

* * *

[11] incorrect. I've seen one – maybe five or six pieces [sic] paper of evidence. I haven't seen the file. They wouldn't let me see everything until I was officially in. I did glance at a couple of documents, but that was it.

MR. PESQUERA: And, also, Your Honor, if I may have the right to add, according to the opposition of the State, they are not alleging that their case will be jeopardized in any way, or fashion, by this continuance. As a matter of fact, all I see from the State, is, he has been on the docket for two and a half months. We're ready to go. But the State will not be jeopardized, and will not be

prejudiced by granting the continuance. As far as we know, there has been no such allegation.

THE COURT: Well, the case has been on, there is no question this case has been around for a while. We usually get these cases tried quickly.

MR. PESQUERA: I understand.

THE COURT: If it's a captial [sic] case, or whatever, you get your time, and that's about it. You won't get an ordinary amount of time for trying these cases, or being on these cases. We try cases quickly.

MR. R. RODRIGUEZ: One other thing, Your Honor.

MR. HENLEY: Judge if I –

THE COURT: Let me just conclude. If you [12] want to come on in into this case, that's fine. I will let you come in, and I'll show your appearance as counsel, also, and I will give you some continuance on this thing, over objection of the State. But I will not give you what you're requesting. You can mention the rules, or whatever, but you don't have that.

The trial date will be set for March 5. Talk to counsel – talk to your client right now. If you can try it then, fine. If you cannot try it then, then don't represent this defendant. Otherwise, you're stuck on that trial date for March 5.

MR. PESQUERA: I can tell the Court now that I will [sic] unable to –

THE COURT: Well, you told me you had a capital case in March.

MR. PESQUERA: No, no.

THE COURT: And you said that you had too many cases –

MR. PESQUERA: I apologize if I gave the wrong information.

THE COURT: If you will not be able to try him then, then, you will not be able to handle this case. But I will give you that short period of time.

MR. PESQUERA: I will not be able to do that, I appreciate the Court's concern, but I do have a **[13]** trial in March and another one in April, and I will not be able to be here for both trials. So if that is the case, unfortunately, my office, then, cannot assume legal representation.

THE COURT: Well, that's why I'm asking, if you want to talk to counsel, and talk to your client, and see what you want to do on that basis. But that's as far as I will let this case go. All right?

MR. R. RODRIGUEZ: For the record Mr. Dan Rodriguez does not object to us extending the period, if the Court would extend it four months to give us time to prepare. It is his life, and it is his freedom that is at stake here, and we need the time to prepare the case.

THE COURT: And everybody that comes in this court has the same situation when they're facing time in prison, and what-have you. It's not like it's being effected.

This case has been on file since last October, since we brought him before the court. It's been a long period of time. And – I've given you time, and you've come in here, "Judge, I'm going to see if they're going to hire me."

MR. R. RODRIGUEZ: And I explained to the Court that the family was trying to raise some money.

CAUSE #00-CR-1025-B

THE STATE OF TEXAS	IN THE DISTRICT COURT
vs.	**138th JUDICIAL COURT–**
DAN RODRIGUEZ	CAMERON COUNTY, TEXAS

VERIFIED MOTION FOR CONTINUANCE

(Date Stamped Filed March 5, 2001)

COMES NOW, the Defendant, **DAN RODRIGUEZ**, by and through his undersigned attorneys and very respectfully **STATES, ALLEGES** and **PRAYS** as follows:

1. Trial in the instant cause is scheduled to begin on the 5th day of March, 2001. Defendant respectfully prays for a minimum 60-day continuance based on the following grounds:

A. There are three (3) defense witnesses presently residing in Colombia that have been unable to obtain the required visas to travel to Texas and testify in this cause. The witnesses are Elver Guañarita, Rodrigo Urbano and William Sánchez. These witnesses are essential for defendant Dan Rodriguez to present his alibi defense. All three witnesses will testify that on August 6, 1989, defendant Dan Rodriguez was residing in Colombia;

B. Defendant attempted to retain the services of an expert witness to attack the reliability of the eyewitnesses identification pursuant to ***Weatherred v. State*, 963 S.W. 2d 115**

(Tex. App. Beaumont, 1998). However, due to the distance and the fact that the State does not provide copy of the discovery, it will be necessary for the expert witness to travel to Texas and examine the files in order to prepare his report. Because of the time limitation, the defense has been unable to do so; and,

C. The defense has been unable to interview Mr. Marvin Lee who is the witness announced by the State that will testify that while imprisoned with defendant Dan Rodriguez he allegedly confessed to Mr. Lee having been the trigger man in this alleged murder. Defendant Dan Rodriguez, through a private investigator in Florida, attempted to contact this person, but was informed he was a fugitive. The District Attorney's Office has refused to provide any information as to Mr. Marvin Lee's whereabouts so that we may proceed to interview him.

2. Defendant previously waived speedy trial in the instant cause.

3. Granting this request will in no way prejudice the State in its presentation of the case. To the contrary, defendant will be unable to present his defense should this continuance not be granted.

4. This motion is filed in good faith and without any intention whatsoever to unnecessarily delay the proceedings.

5. Pursuant to Article 29.03 defendant respectfully submits that there is more than sufficient good cause to grant the continuance requested.

6. Denying this request for continuance will constitute a denial of defendant's constitutional right to a fair trial by forcing him to go to trial with such expedition and depriving him of the required effective aid and assistance of counsel. ***White v. Rallen*, 324 U.S. 760 (1945).**

WHEREFORE, IT IS RESPECTFULLY PRAYED THAT THIS MOTION BE **GRANTED**, that trial be continued for a minimum of 60 days and that it be rescheduled for some time during the month of May, 2001.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to Mr. Geoff Henley, State Attorney's Office, 974 East Harrison Street Brownsville, Texas 78520, this 27th day of January, 2001.

/s/ Ricardo R. Pesquera
RICARDO R. PESQUERA
Florida Bar #0876062
646 East Colonial drive
Orlando, Florida 32803
Phone: (407) 898-4000
Fax: (407) 898-2432

JURAT

I, **Ricardo R. Pesquera**, counsel for defendant **Dan Rodriguez**, do hereby under oath state that the information contained in this motion is the truth to the best of my knowledge.

/s/ Ricardo R. Pesquera, Esq.
RICARDO R. PESQUERA, ESQ.

STATE OF FLORIDA
COUNTY OF ORANGE

SWORN and SUBSCRIBED to before me by **Ricardo R. Pesquera, Esq.** who personally appeared before me and is personally known to me. In Orlando, Orange County, Florida, this 28th day of February, 2001.

[SEAL] C. Yanir Rosado
Commission #CC990139
Expires Feb. 3, 2005
Bonded Thru
Atlantic Bonding Co., Inc.

/s/ C. Yanir Rosado
C. YANIR ROSADO
Notary Public – State of Florida
646 East Colonial Drive
Orlando, Florida 32803-4603
Phone: (407) 898-4000

REPORTER'S RECORD
VOLUME 3 OF 8 VOLUMES
TRIAL COURT CAUSE NO. 00-CR-1025-B

THE STATE OF TEXAS	:IN THE DISTRICT COURT
VS.	:138TH JUDICIAL
DAN RODRIGUEZ	DISTRICT
	CAMERON COUNTY,
	TEXAS

****

PRETRIAL HEARING

****

On the 5th day of March 2001, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Robert Garza, Judge presiding, held in Brownsville, Cameron County, Texas.

Proceedings reported by machine shorthand.

* * *

[004] PROCEEDINGS

March 5, 2001

10:30 a.m.

THE COURT: Mr. Rodriguez?

These are motions before the Court, Your Honor.

(Defendant present)

THE COURT: All right. For the record the defendant is resent. Go ahead and sit down.

MR. PESQUERA: May I proceed, Your Honor?

THE COURT: Sure.

MR. PESQUERA: Good morning, Your Honor. The first thing that we want to cover before we urge a motion for continuance, which we would like to place the grounds on the record. I have a verified motion that was prepared and tendered to the Court.

In essence, Your Honor, if the Court will remember, we appeared here two months ago and I requested a formal continuance. The Court granted us a two months continuance. However, we are in a position that we are not ready to proceed for the following reasons.

Number one: There are three witnesses from Colombia, that are alibi witness. Basically, they are defense witnesses, that is, on August 6, 1989, when this alleged kidnapping took place, these witnesses will **[005]** be ready to testify that Mr. Rodriguez was in Columbia. This information comes from the father of Mr. Rodriguez, Don Cesar. He has been trying to – he has contacted these witnesses and has tried to make contact with these witnesses and has tried to obtain visas for them. Unfortunately, they have not been able to obtain visas. That's the information that I received on February 28. And then I, again, spoke with him on March 3, and he informed me that the status was the same.

Even Don Cesar Rodriguez even requested the involvement of his congressman, which is Mr. John Mika (phonetically written) And I understand that they are trying to help Mr. Rodriguez obtain the visas for these folks.

The second ground for continuance, the State says there is a convict by the name of Marvin Lee who will testify, supposedly, that my client confessed a murder and kidnapping to this individual. During the investigation that we conducted on Marvin Lee we found out that he has an extensive penal record – over 20 felony convictions – plus, at the time, he was a fugitive. I explained that to the state attorney's office. Apparently, as I understand it they have made the arrangement to have him here. We don't know where he is. We haven't had an opportunity to interview him. **[006]** Plus, we also interviewed two chiefs of police. One is the chief of police for Hanes City (phonetically written) in Florida, and the other one is a major with the Poll County Sheriff's Department. Both of these individuals, we have the memoranda that was prepared by my private investigator while interviewing these two folks. Basically they say that this informant is an expert informant, and that none of the information he has ever provided has ever turned out to be true, and that the reputation. of this alleged informant with the law enforcement community of the state of Florida, is, that he is a liar and that his reputation for truthfulness does not exist. This was given to us on March 1. Obviously, we spoke with him. In an attempt to having spoken with him, he was not able to do so, and we are asking for a continuance so we will then be able to schedule depositions with him, and so that that testimony will be provided, or obtained. So they will have sufficient time for them to come over here.

Thirdly, Your Honor, there are four witnesses that appeared in the State's witness list filed with the Court. That is Gonzalo Moreno; Timothy Young, Noelia De Leon, and Petra Marie Floyd. We have attempted to contact

these people on the address that appears. That address which has been provided by the State, gives **[007]** us a bad address. These people do not live here, we don't know their whereabouts and we have not been able to contact them, in order to prepare for our defense.

And finally, Your Honor, we also are attempting to retain the services of an expert witness to attack the reliability of the pretrial identification that was done in this case, which is in essence the crux of the State's case. I doubt it very highly. In fact some of them that we have interviewed indicated they have no independent recollection of the people that they identified in the photo spread.

We have also filed a motion to suppress the photo spread alleging that the procedure used was impermissibly suggestive and in violation of my client's rights. However, since the procedure here is, that the State does not provide copies of the evidence, this expert would have to come over here, analyze everything in here in order to do that, and said he needs a minimum of 45 to 60 days in order to complete that.

But most importantly on those two grounds are the two first two that I indicated:

Q The lack of my alibi witnesses. That within sixty days I will be able to have them here, and I have requested documentation – written documentation as to all of the efforts that have been made in order to **[008]** make it part of the record.

And also the fact of Mr. Marvin Lee Mr. Marvin Lee is supposedly the only one that my client allegedly confessed the murder. And attacking the credibility of this witness is

very important. Just because he has twenty felony convictions, I think is not enough. I think the reputation within the law enforcement community of being a bad informant, an informant who lies, and informant who is manipulative, and informant that would do anything to benefit himself, is needed in order for us to destroy the credibility. And that's why we are asking that we either be allowed to take depositions over there in Florida, or that they be given sufficient time for them to come over here.

MR. HENLEY: Judge, with regard to Mr. Marvin Lee, he is presently in our custody here in Cameron County. If Marvin Lee wants to cooperate, it will be up to him whether he wants to talk to them or not.

Concerning the expert witness, Judge, I have previously by electronic mail given Mr. Pesquera a few cases saying that expert witnesses in the art, or reliability of eye-witness identification have been thrown out several times because it is considered junk science.

[009] In addition, I would also object because they have failed to provide me the address and the name of the expert witnesses that they are supposed to tender to me. Under previous – recently revised statutory laws regarding discovery, we now have reciprocal discovery concerning the disclosure of expert witnesses. They haven't done that. They failed to do that. Therefore, they should be using that as a means of getting more time.

Judge, you've had this case continued before and the last time up here you said, look this is it. You get two months – both sides – you have two months, and that's it. And that's what I'm asking, Judge. I'm asking that you deny their motion for continuance, and set this case for trial, as we talked about before and move it along.

THE COURT: All right. Motion for continuance is denied. What other motions have you got?

MR. PESQUERA: There were a number of pretrial motions that were filed, Your Honor, that were filed with the first set of pretrial motions. A lot of it has to do with discovery.

THE COURT: Have you seen their open record and file?

MR. PESQUERA: We did examine their file,

REPORTER'S RECORD
VOLUME 7 OF 8 VOLUMES
TRIAL COURT CAUSE NO. 00-CR-1025-B

THE STATE OF TEXAS	:	IN THE DISTRICT COURT
VS.	:	138TH JUDICIAL DISTRICT
DAN RODRIGUEZ	:	CAMERON COUNTY, TEXAS

****

TRIAL ON THE MERITS – DAY THREE

****

On the 8th day of March 2001, the following proceedings continued, and concluded, in the above-entitled and numbered cause before the Honorable Robert Garza, Judge Presiding, held in Brownsville, Cameron County, Texas.

Proceedings reported by machine shorthand.

* * *

[61] THE COURT: Your client is not going to testify?

(Discussion off the record)

THE COURT: We'll wait a few minutes.

MR. PESQUERA: Thank you.

(End of bench conference)

THE COURT: All right. Ladies and gentlemen, let's take about five minutes or so. Please step into the jury room, please.

(Recess from 11:30 a.m. to 11:40 a.m.)

THE COURT: Be seated, please, Mr. Pesquera?

MR. PESQUERA: Your Honor, the witness has not arrived. I need to ask for a continuance. Can I approach the bench?

THE COURT: Come on up.

(At the bench, on the record)

MR. PESQUERA: Your Honor, unfortunately the witness was not able to make it. This is one specific witness that we thought was going to get the Visa on time from Colombia.

THE COURT: What's his name, or her name?

MR. PESQUERA: I got it written down.

THE COURT: Get the name, please.

MR. PESQUERA: Sure. (retrieves folder **[62]** from table)

THE COURT: This on the motion for continuance, Al. Maybe I can track it down. Is it Rodrigo, Albert, or William?

MR. PESQUERA: No. The first one – Albert.

MR. HENLEY: Judge, I would ask that we lower our voices. I don't want the jury to speculate that these people have anything to say.

THE COURT: All right. It's Albert –

MR. PESQUERA: Wenchirita.

THE COURT: Wenchirita.

MR. PESQUERA: Right. She is one of the three witnesses that would have testified, that my client was in Colombia on August 6. She was an alibi witness.

THE COURT: As far as the reason – apparently, she was unable to resolve her Visa status.

MR. PESQUERA: We're using all our possible, like I said Congressman John –

THE COURT: I understand that. But it's not like you're going to be able to get that witness here overnight.

MR. PESQUERA: No. I cannot guarantee it.

THE COURT: The reason I would grant the continuance in the first place, obviously, this defendant **[63]** knew about these witnesses. We've gone under 1499. So it's not like he didn't know.

MR. PESQUERA: We've [sic] trying to get this moved down, and we were unsuccessful.

THE COURT: The request for continuance is denied. The request to continue this matter until this other witness appears, is denied.

MR. PESQUERA: We move for mistrial at this time.

THE COURT: It will be denied.

(End of bench conference)

MR. PESQUERA: In view of the facts of what we've expressed to the Court in sidebar, and based on the rulings of the Court, I have no other recourse than to rest, Your Honor, at this time.

THE COURT: Any rebuttal?

MR. HENLEY: No rebuttal, Judge. We close.

THE COURT: The defense?

MR. PESQUERA: No additional witnesses, or testimony that will be presented.

THE COURT: You close?

THE COURT: Ladies and Gentlemen, what has happened at this stage, both the State and the defense have rested and closed their cases. In other words, what

* * *

CAUSE #00-CR-1025-B

THE STATE OF TEXAS	IN THE DISTRICT COURT
vs.	**138th JUDICIAL COURT**
DAN RODRIGUEZ	CAMERON COUNTY, TEXAS

MOTION FOR NEW TRIAL UNDER RULE 21.3(b) and (e) OF THE RULES OF CRIMINAL PROCEDURE AND REQUEST FOR AN EVIDENTIARY HEARING

(Date Stamped Filed March 19, 2001)

COMES NOW, the Defendant, **DAN RODRIGUEZ**, by and through his undersigned attorneys and very respectfully **STATES, ALLEGES** and **PRAYS** as follows:

1. On Thursday, March 8, 2001 defendant Dan Rodriguez was convicted by a jury of his peers on all four (4) counts of the indictment and sentenced to four (4) concurrent life sentences.

2. Pursuant to Rule 213(b) and (e) of the Rules of Criminal Procedure, defendant Dan Rodriguez is entitled to have a new trial based on the following:

A. The Assistant County Criminal District Attorney prosecuting the case committed prosecutorial misconduct when knowingly allowing perjured testimony from witnesses who testified that on August 6, 1989 defendant Dan Rodriguez was wearing a black suit. The District Attorney's Office is in possession of numerous reports of various witnesses reflecting that on different days, including the day of the alleged kidnaping,

two of the culprits were wearing suits and the third, allegedly Dan Rodriguez, was not. This testimony contradicts the statements made by witnesses at trial and the prosecutor failed to both correct the testimony and also provide defense counsel with this impeachment material previously requested specifically under the doctrines of ***Brady v. Maryland*, 373 U.S. 83 (1963); *U.S. v. Bagley*, 473 U.S. 667 (1985)** and ***Kyles v. White*, 1155 S.Ct. 155 (1995)**. This impeachment information is highly material to the defense insofar as most witnesses testified that they allegedly remembered defendant distinctively because of the black suit;

Defendant respectfully prays from this Honorable Court to issue an order instructing the District Attorney to turn over to defendant any and all reports of all witnesses who identified Dan Rodriguez. In the alternative, it is prayed that it be turned over for an "in camera" review and be made part of the record for appellate proceedings. Further, defendant respectfully prays that an evidentiary hearing be scheduled to further present evidence concerning this perjury;

B. The trial court committed reversible error when refusing to grant the continuance so that:

i. Three (3) alibi witnesses would have sufficient time to obtain their visas and travel from Colombia to testify for the defense; and, —

ii. Take depositions of two (2) witnesses in Florida who would testify that as Chiefs of Police they are aware of Marvin Lee's reputation in the law community for being a person who is not trustworthy;

C. The trial court committed reversible error when allowing defense counsel only 45 minutes to *voir dire* a panel of approximately sixty (60) prospective jurors;

D. The trial court committed reversible error when not excusing by cause two potential jurors that defense counsel was then forced to recuse by using two peremptories;

E. The trial court committed reversible error when allowing the District Attorney to present fingerprint testimony of an analysis that was conducted during trial not permitting thereby for defendant to adequately prepare cross-examination and retain his own expert to review this matter;

F. The trial court committed reversible error when allowing hearsay testimony from numerous witnesses to come in through the testimony of FBI Agent Nixon;

G. The trial court committed reversible error when refusing to instruct the jury on inconsistent statements and prior criminal records as impeachment evidence;

H. The Assistant County Criminal District Attorney prosecuting the case committed plain

error when illegally commenting on defendant's right to remain silent during the closing argument; and,

I. The cumulative effect of all errors committed during trial could not be cured by any type of curative instructions thereby causing reversible error,

3. Defendant respectfully prays for an evidentiary hearing to be held to present further evidence on the grounds for new trial.

4. In view of the grounds state [sic], defendant is entitled for a new trial to be held.

WHEREFORE, it is respectfully prayed that this motion be **GRANTED**.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to Mr. Geoff Henley, State Attorney's Office, 974 East Harrison Street, Brownsville, Texas 78520, this 16th day of March, 2001.

/s/ Ricardo R. Pesquera
RICARDO R. PESQUERA
Florida Bar #0876062
646 East Colonial Drive
Orlando, Florida 32803
Phone: (407) 898-4000
Fax: (407) 898-2432

CAUSE #00-CR-1025-B

THE STATE OF TEXAS	IN THE DISTRICT COURT
vs.	138TH JUDICIAL COURT
DAN RODRIGUEZ	CAMERON COUNTY, TEXAS

NOTICE OF FILING

(Date Stamped Filed April 4, 2001)

COMES NOW, the Defendant, **DAN RODRIGUEZ**, by and through his undersigned attorneys and very respectfully **STATES**, **ALLEGES** and **PRAYS** as follows:

1. Before trial began in the instant case, defendant requested a continuance so that three (3) alibi witnesses who would testify that Mr. Dan Rodriguez was in Colombia on August 6, 1989, the day the alleged kidnaping took place, would be able to travel to Brownsville, Texas, to testify for the defense.

2. The undersigned attorney proffered the testimony of these three witnesses and explained they were unable to travel because immigration requirements had not been met on time. However, if the court granted a continuance they would be able to travel to Texas within a period of sixty days.

3. The undersigned attorney further expressed that sworn statements to these effects would later be filed for appellate proceedings.

4. The court's denial of defendant's Motion for Continuance did not permit defendant to present his alibi defense therefore denying him his constitutional right to a fair trial by forcing him to go to trial without being able to

present his defense. This also constitutes a denial of due process that is essential to a fair trial.

5. Attached to this Notice of Filing are three (3) sworn statements prepared in Spanish together with a certified translation indicating that had a continuance being [sic] granted, they would have been able to travel to Texas and testify that on August 6, 1989 Mr. Dan Rodriguez was in Columbia.

WHEREFORE, it is respectfully prayed from this court to take notice of this filing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to Mr. Geoff Henley, State Attorney's Office, 974 East Harrison Street, Brownsville, Texas 78520, this 30th day of March, 2001.

/s/ Ricardo R. Pesquera
RICARDO R. PESQUERA
Florida Bar #0876062
646 East Colonial Drive
Orlando, Florida 32803
Phone: (407) 898-4000
Fax: (407) 898-2432

(TRANSLATION)

(Seal – Eighth Notary, Cali-Valle)
REPUBLIC OF COLOMBIA
COLOMBIA, S.A.

EIGHTH NOTARY OF THE CALI CIRCUIT

ACT OF SWORN STATEMENT FOR EXTRA PROCEDURAL PURPOSES
Decree 1557 of July 14, 1989, Article 1.

Before me appeared **WILLIAM SANCHEZ**, who after being duly sworn **DEPOSED AND SAID** as follows:

1. That my name is Elver Guañarita and I reside in the Republic of Colombia;

2. That if I had testified at the trial of Dan Rodríguez in the state of Texas, United States of America, I would have said, among other things, that I have personal knowledge that on August 6, 1989 Mr. Dan Rodríguez was present in the Republic of Colombia;

3. That due to the short time granted and other immigration problems, it was impossible for me to travel to the state of Texas to testify at trial during the week of March 5 thru 9, 2001;

4. That if trial had been held during the month of May, 2001, I would have been able to be present;

5. That if a new trial is held, I will be able to testify at the same;

6. That I gave this statement freely and voluntarily without the presence of any duress or coercion whatsoever.

(Signed) WILLIAM SANCHEZ (I.D. Seal)
I.D. #16.639.613, Cali

REPUBLIC OF COLOMBIA

Sworn and signed before me by William Sánchez, this 27th day of March, 2001.

(Signed) EDGAR VICTORIA GONZALEZ
Eighth Notary Public of Cali

(Notary Seal)

CERTIFICATE OF TRANSLATOR

I, C. Yanir Rosado, hereby certify that I am competent to translate from Spanish into English and that the foregoing translation is an accurate translation of the Spanish version.

/s/ C. Yanir Rosado
C. Yanir Rosado
646 East Colonial Drive
Orlando, Florida 32803-4603

Sworn to and subscribed before me by
C. Yanir Rosado who is known to me
on this 2nd day of April, 2001.

[SEAL]
Thiara M. Rodriguez
My Commission CC867814
Expires August 30, 2003

/s/ Thiara M. Rodriguez
THIARA M. RODRIGUEZ
Notary Public – State of Florida
646 East Colonial Drive
Orlando, Florida 32803-4603
Phone: (407) 898-4000

Republica de Colombia
27 MAR. 2001
Notaria Octava

REPUBLICA DE COLOMBIA
COLOMBIA, S.A.

**NOTARIA OCTAVA DEL CIRCULO DE CALI.

ACTA DE **DECLARACIÓN JURADA** PARA FINES EXTRAPROCESALES.

DECRETO 1557 DEL 14 DE JULIO DE 1.989 ARTICULO 1.

Compareció ante mi **WILLIAM SANCHEZ**, quien después de haber sido debidamente juramentado, **EXPUSO y TESTIFICO** lo siguiente:

1. Que me llamo William Sánchez resido en la República de Colombia;

2. Que de haber testificado durante el juicio del Sr. Dan Rodríguez en el estado de Texas, Estados Unidos de América, hubiese dicho, entre otras cosas, que tengo conocimiento personal que en el día 6 de agosto de 1989 el Sr. Dan Rodríguez se encontraba presente en la República de Colombia;

3. Que debido al corto tiempo otorgado y otros problemas de inmigración, me fue imposible viajar al estado de Texas para testificar en el juicio durante la semana del 5 al 9 de marzo de 2001;

4. Que de haberse celebrado el juicio durante el mes de mayo de 2001, sí hubiese podido asistir;

5. Que de celebrarse un nuevo juicio podré testificar en el mismo;

6. Que doy esta declaración jurada libre y voluntariamente sin que medie coacción o amenaza de clase alguna.

/s/ William Sanchez
WILLIAM SANCHEZ
[Fingerprint Omitted
In Printing]

REPUBLICA DE COLOMBIA

Juramentado y firmado ante mi por WILLIAM SANCHEZ, el día 27 de MARZO de 2001.

NOTARIO PUBLICO

EDGAR VICTORIA GONZALEZ
NOTARIO OCTAVO TITULAR
DE CALI.

(TRANSLATION)

REPUBLIC OF COLOMBIA
COLOMBIA, S.A.

SWORN STATEMENT

Before me appeared **ELVER GUAÑARITA**, who after being duly sworn **DEPOSED AND SAID** as follows:

1. That my name is Elver Guañarita and I reside in the Republic of Colombia;

2. That if I had testified at the trial of Dan Rodríguez in the state of Texas, United States of America, I would have said, among

other things, that I have personal knowledge that on August 6, 1989 Mr. Dan Rodríguez was present in the Republic of Colombia;

3. That due to the short time granted and other immigration problems, it was impossible for me to travel to the state of Texas to testify at trial during the week of March 5 thru 9, 2001;

4. That if trial had been held during the month of May, 2001, I would have been able to be present;

5. That if a new trial is held, I will be able to testify at the same;

6. That I give this statement freely and voluntarily without the presence of any duress or coercion whatsoever.

(Signed) ELVER GUAÑARITA

Act of Acknowledgement
Article 34 Decree 2148 of 1983

Before me appeared Elver Guañarita, who presented I.D. #16543.897, Cali, and declared that the signature and fingerprint appearing herein are his own and that the contents of this document is the truth. Cali, March 27, 2001.

(Signed) ELVER GUAÑARITA, Declarant

Acknowledgement authorized by:

(Declarant's fingerprint)

(Signed) JORGE E. CAICEDO ZAMORANO, Notary Public, Cali

(Notary Seal)

(Certificate of Translator on the other side)

CERTIFICATE OF TRANSLATOR

I, C. Yanir Rosado, hereby certify that I am competent to translate from Spanish into English and that the foregoing translation is an accurate translation of the Spanish version.

/s/ C. Yanir Rosado
C. Yanir Rosado
646 East Colonial Drive
Orlando, Florida 32803-4603

Sworn to and subscribed before me by
C. Yanir Rosado who is known to me
on this 2nd day of April, 2001.

[SEAL]
Thiara M Rodriguez
My Commission CC867614
Expires August 30, 2003

/s/ Thiara M. Rodriguez
THIARA M. RODRIGUEZ
Notary Public – State of Florida
646 East Colonial Drive
Orlando, Florida 32803-4603
Phone: (407) 898-4000

REPUBLICA DE COLOMBIA
COLOMBIA, S.A.

DECLARACIÓN JURADA

Compareció ante mi **ELVER GUAÑARITA**, quien después de haber sido debidamente juramentado, **EXPUSO y TESTIFICO** lo siguiente:

1. Que me llamo Elver Guañarita y resido en la República de Colombia;

2. Que de haber testificado durante el juicio del Sr. Dan Rodríguez en el estado de Texas, Estados Unidos de América, hubiese dicho, entre otras cosas, que tengo conocimiento personal que en el día 6 de agosto de 1989 el Sr. Dan Rodríguez se encontraba presente en la República de Colombia;

3. Que debido al corto tiempo otorgado y otros problemas de inmigración, me fue imposible viajar al estado de Texas para testificar en el juicio durante la semana del 5 al 9 de marzo de 2001;

4. Que de haberse celebrado el juicio durante el mes de mayo de 2001, sí hubiese podido asistir;

5. Que de celebrarse un nuevo juicio podré testificar en el mismo;

6. Que doy esta declaración jurada libre y voluntariamente sin que medie coacción o amenaza de clase alguna.

/s/ Elver Guañarita
ELVER GUAÑARITA

REPUBLICA DE COLOMBIA

Juramentado y firmado ante mi por ELVER GUAÑARITA, el día de de 2001.

NOTARIO PUBLICO

(Notarized on the back)

(TRANSLATION)

REPUBLIC OF COLOMBIA
COLOMBIA, S.A.

SWORN STATEMENT

Before me appeared **RODRIGO URBANO**, who after being duly sworn **DEPOSED AND SAID** as follows:

1. That my name is Rodrigo Urbano and I reside in the Republic of Colombia;

2. That if I had testified at the trial of Dan Rodríguez in the state of Texas, United States of America, I would have said, among other things, that I have personal knowledge that on August 6, 1989 Mr. Dan Rodríguez was present in the Republic of Colombia;

3. That due to the short time granted and other immigration problems, it was impossible for me to travel to the state of Texas to testify at trial during the week of March 5 thru 9, 2001;

4. That if trial had been held during the month of May, 2001, I would have been able to be present;

5. That if a new trial is held, I will be able to testify at the same;

6. That I give this statement freely and voluntarily without the presence of any duress or coercion whatsoever.

(Signed) RODRIGO URBANO

Act of Acknowledgement
Article 34 Decree 2148 of 1983

Before me appeared José Rodrigo Urbano, who presented I.D. #16781.945, Cali, and declared that the signature and fingerprint appearing herein are his own and that the contents of this document is the truth. Cali, March 27, 2001.

(Signed) RODRIGO URBANO, Declarant

Acknowledgement authorized by:

(Declarant's fingerprint)

(Signed) JORGE E. CAICEDO ZAMORANO, Notary Public, Cali

(Notary Seal)

(Certificate of Translator on the other side)

CERTIFICATE OF TRANSLATOR

I, C. Yanir Rosado, hereby certify that I am competent to translate from Spanish into English and that the

foregoing translation is an accurate translation of the Spanish version.

/s/ C. Yanir Rosado
C. Yanir Rosado
646 East Colonial Drive
Orlando, Florida 32803-4603

Sworn to and subscribed before me by
C. Yanir Rosado who is known to me
on this 2nd day of April, 2001.

[SEAL]
Thiara M Rodriguez
My Commission CC867614
Expires August 30, 2003

/s/ Thiara M. Rodriguez
THIARA M. RODRIGUEZ
Notary Public – State of Florida
646 East Colonial Drive
Orlando, Florida 32803-4603
Phone: (407) 898-4000

REPUBLICA DE COLOMBIA

COLOMBIA, S.A.

DECLARACIÓN JURADA

Compareció ante mi **RODRIGO URBANO**, quien después de haber sido debidamente juramentado, **EXPUSO y TESTIFICO** lo siguiente:

1. Que me llamo Rodrigo Urbano y resido en la República de Colombia;

2. Que de haber testificado durante el juicio del Sr. Dan Rodríguez en el estado de Texas, Estados Unidos de América, hubiese dicho, entre otras cosas, que tengo conocimiento personal que en el día 6 de agosto de 1989 el Sr. Dan Rodríguez se encontraba presente en la República de Colombia;

3. Que debido al corto tiempo otorgado y otros problemas de inmigración, me fue imposible viajar al estado de Texas para testificar en el juicio durante la semana del 5 al 9 de marzo de 2001;

4. Que de haberse celebrado el juicio durante el mes de mayo de 2001, sí hubiese podido asistir;

5. Que de celebrarse un nuevo juicio podré testificar en el mismo;

6. Que doy asta declaración jurada libre y voluntariamente sin que medie coacción o amenaza de clase alguna.

/s/ Rodrigo Urbano
RODRIGO URBANO

REPUBLICA DE COLOMBIA

Juramentado y firmado ante mi por RODRIGO URBANO, el día de de 2001.

NOTARIO PUBLICO

(Notarized on the back)